IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 110.

SEATRAIN LINES, INC.,

Appellant,

v.

THE NEW YORK, NEW HAVEN and HARTFORD RAILROAD COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

APPELLANT'S BRIEF.

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INDEX.

Subject Matter.

Appendix.

Authorities Cited.

CASES

STATUTES.

LEGISLATIVE HISTORY.

PAGE

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Opinions Below.

The opinion of the United States District Court for the District of Connecticut (R. 241) is reported in 199 F. Supp. 635 (1961), the decision of the Interstate Commerce Commission (R. 4) in 313 I. C. C. 23 (1960).

Jurisdiction.

Probable jurisdiction was noted October 8, 1962, 371 U. S. 808 (R. 273), and this case consolidated with Nos. 108, 109 and 125 which are separate appeals from the same judgment by the Interstate Commerce Commission,

Sea-Land Service, Inc. and the United States, respectively. (R. 274). The jurisdiction of this Court to review the judgment and decision of the District Court by direct appeal is conferred by 62 Stat. 926 (1948), 28 U. S. C. §1253 (1958) and 62 Stat. 961 (1948), 28 U. S. C. §2101(b) (1958).

Statutes Involved.

The following statutes are involved: Interstate Commerce Act, §§15(7), 15a, 305(c) and 307(d) (49 U. S. C. §§15(7), 15a, 905(c) and 907(d) (1958)), [hereinafter referred to as the Act] and the National Transportation Policy (49 U. S. C. preceding §§1, 301, 901 and 1001 (1958)). The foregoing statutes are set forth in the Appendix.

Questions Presented.

The questions presented by this appeal are as follows:

1. Whether in determining the reasonableness of drastically reduced rail rates, which are limited to points served by water carriers and which are designed to divert traffic from regulated common carriers by water, the Interstate Commerce Commission is required to place exclusive reliance on the costs of the competitive rail and water services?

2. Whether Section 15a(3) of the Act, as added to the Act in 1958, made a major modification in the National Transportation Policy, so as to make costs of providing service the principal, if not the exclusive, criterion by which the lawfulness of competitive rate reductions must be determined?

3. Whether the Interstate Commerce Commission's findings that certain reduced railroad trailer-on-flat-car rates would preclude the coastwise water

carriers from competing at equal rates with the railroads' service, would result in a vicious cycle of rate cutting and would threaten the continued existence of the coastwise water carrier industry generally and its further findings that coastwise shipping is important for national defense purposes and is an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States justify the conclusion of the Commission that the appellee railroads failed to sustain their statutory burden of proof "that the proposed changed rate * * * is just and reasonable" under Section 15(7) of the Interstate Commerce Act?

Statement of the Case.

The order of the Interstate Commerce Commission, which is under review in this action, directed the cancellation of some 66 of the railroad appellees' drastically reduced trailer-on-flat-car (TOFC or "piggy back") rates on various commodities between eastern points, on the one hand, and Dallas and Fort Worth, Texas, on the other hand. Appellees' rates were limited to points served by water carriers now operating in the Atlantic-Gulf trade, namely Seatrain Lines, Inc. and Sea-Land Service, Inc. (referred to in the Commission's reports below under its former name, Pan-Atlantic Steamship Corporation) and were concededly designed to divert traffic from Seatrain and Sea-Land.

Seatrain is a common carrier by water certificated by the Interstate Commerce Commission for transportation of commodities generally between the port of New York and the Gulf ports of New Orleans, La., and Texas City, Texas and between the ports of New York and Savannah, Ga. Seatrain's service consists of transporting freight in railroad cars on its ocean going vessels. The railroad cars

move to the dockside of Seatrain's vessels, are lifted on to them and are moved by water between the ports served by Seatrain. At the port of destination, the rail cars are removed from Seatrain's vessels and then proceed by rail to the consignee. Seatrain's service is commonly known as a rail-water-rail, non-break-bulk service.*

Sea-Land's water operations are substantially similar to those of Seatrain, except that Sea-Land's vessels carry demountable highway trailers instead of rail boxcars. Sea-Land's service is commonly known as a motor-water-motor, non-break-bulk service.

The railroad appellees' TOFC service is a non-break-bulk motor-rail-motor service, wherein goods are transported by highway trailer over the road, are then transported on rail flatcars in the same trailers over the rails and subsequently proceed in the same trailer over the road to their ultimate destination. TOFC, or "piggy back" service, was not provided in any substantial volume by the appellees until recent years.

Prior to 1957 the rates set for TOFC service were generally on a parity with those in force for motor carrier service and somewhat higher than all rail boxcar service. All rail boxcar rates were maintained at higher levels than water rates and combination water-rail and water-motor rates "because of disadvantages in the water service due to perils of the sea, slower transit time and infrequency of sailings". (R. 11).

Because of these disabilities it has been impossible for Seatrain to attract any traffic at equal rates to all rail boxcar service and the Commission has repeatedly found that all rail boxcar service is superior to Seatrain's service.

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* Its operations have been the subject of litigation before this Court in *United States* v. *Pennsylvania R. R.*, 323 U. S. 612 (1945).

Wrought Pipe and Fittings, 234 I. C. C. 347, 391 (1939); *Liquor From North Atlantic Ports to Savannah*, 289 I. C. C. 104, 105 (1953); *Iron and Steel from Edgewater, N. J. to Savannah, Ga.*, 294 I. C. C. 411, 417-419 (1955). Since TOFC service is admittedly superior to all rail boxcar service, it necessarily follows that TOFC service is superior to Seatrain's service.

In 1957, the appellee railroads filed the rates for their TOFC service in issue here with the Commission which were substantially on a parity with the rates of Seatrain and Sea-Land. (R. 18). In connection with such rates the appellees also applied to the Commission for relief from the provisions of Section 4(1) of the Act (49 U. S. C. 4(1)) since their proposed reduced TOFC rates would result in higher rates between intermediate points in shorter hauls than in the longer hauls between East Coast and Texas points in violation of Section 4(1) of the Act.

The proposed reduced TOFC rates and the Fourth Section application were opposed by Seatrain, Sea-Land, a motor carrier association, the Secretary of Agriculture and several municipal authorities.

The rates were suspended and placed under investigation in the Commission's I. & S. Docket No. 6834, *Piggy-Back Rates—Between East and Texas*. On December 19, 1960 the Commission issued its decision on the proposed reduced TOFC rates and ordered that the proposed rates be cancelled on the ground that they were not shown to be just and reasonable. Fourth Section relief was also denied. (R. 42).*

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* The Commission issued a consolidated report, I. & S. No. M-10415, *Commodities-Pan Atlantic Steamship Corporation*, which embraced I. & S. Docket No. 6834, *Piggy-Back Rates--Between East and Texas*, along with other dockets. Only the rates involved in I. & S. Docket No. 6834 are in issue here.

Extensive basic and essential findings of fact were made by the Commission with respect to the relative costs and relative value of TOFC and water services and the public need for and public interest in maintaining a sound economic water carrier system in support of its conclusion that the reduced TOFC rates were unjust and unreasonable.

Relative Costs of the Service Findings.

The Commission generally found sea-land* costs to be below TOFC costs but for the following two exceptions:

> "The restated sea-land costs, both out-of-pocket and fully distributed, are below the restated TOFC costs for all movements of comparable weight as computed for railroad-owned flat cars having a capacity of a single trailer and equipped with tie-down devices. In connection with flat cars not presently owned but leased by the railroads, designed to hold two trailers with special hold-down devices (called TTX cars), the restated sea-land costs are below the restated TOFC costs for all except two of the 66 movements listed in the restatement. We conclude that, generally, for the movements herein, the costs of record indicate that sea-land is a lower cost service than TOFC". (R. 21).
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> "The restated sea-land costs, both out-of-pocket and fully-distributed, are below the restated TOFC costs for all movements on which the proposed TOFC rates would apply, as computed for flat cars with a single trailer, and also for all but two of the 66 movements computed for two trailers on a TTX car." (R. 36).

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* The sea-land service refers to the truck-water-truck service offered by Sea-Land Service, Inc., formerly Pan-Atlantic Steamship Corp. The Seatrain rail-water-rail service is, of course, also a "sea-land" type service.

Relative Value of the Service Findings.

The Commission found the services of the water carriers, particularly those of Seatrain, to be inferior, from the standpoint of the shipping public, to the TOFC services of the appellees. It pointed out that the "rail carriers regard Seatrain as offering a lower-quality service than TOFC, and TOFC service as generally of higher quality than all-rail boxcar service" (R. 26) and that to "the extent that all-rail service has certain service disadvantages [as compared with door-to-door motor carrier service], such as in the case of a shipper not located on a private siding, these disadvantages also generally beset the Seatrain service". (R. 26). The Commission also concluded that "sea-land service is generally slower than TOFC service" (R. 27) and that "[u]ncertainty of ocean transport, infrequency of sailings, and longer transit time than by TOFC, are factors present both in sea-land and Seatrain service." (R. 28).

The service disadvantages of Sea-Land and Seatrain services are reflected in the extent of their public patronage with respect to the carriage of various commodities. For example, the Commission found that Seatrain "participated in only a small portion of the ammunition traffic" and "in only a very small portion of the candy traffic" between the points involved in this case. The Commission concluded that if these "differentials favorable to Seatrain were replaced by rate equalization, its competitive position would worsen considerably." (R. 24-25). Similarly, with respect to Sea-Land's services, the Commission found that there "is no indication that Pan-Atlantic [Sea-Land] has moved any traffic at rates as high as computing all-rail boxcar or TOFC rates." (R. 22). The Commission further noted that "the pre-

ponderance of the testimony on these records is to the effect that most of the shippers prefer rail service to sea-land service except at lower rates for the latter" and that the "records show no instance of any traffic moving by sea-land except at rates lower than the rail rates." (R. 34). On the basis of this evidence the Commission concluded that "in order to attract traffic, the sea-land service must establish rates somewhat below those of the rail carriers from and to the same points, and that Seatrain, whose rates and service are comparable to Pan-Atlantic's, is in a like position." (R. 34).

The Public Interest Findings.

The Commission also supported its action by making a number of public interest findings as contemplated by the National Transportation Policy. In discussing the National Transportation Policy and its relationship to Section 15a (3) of the Act, the Commission found that "cost is only one of the elements which may appropriately be considered in passing upon the lawfulness of rates" and that due consideration must be given to other objectives of the National Transportation Policy as declared in the Act. Those objectives, among other things, the Commission pointed out, are the provision of "fair and impartial regulation of all modes of transportation subject to the Interstate Commerce Act, so administered as to recognize and preserve the inherent advantages of each, to promote safe, adequate, economical, and efficient service, and foster sound economic conditions in transportation and among the several carriers, all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of

the commerce of the United States, of the Postal Service, and of the national defense." (R. 37).

Among the factors which the Commission noted in its overall consideration of the lawfulness of the proposed TOFC rates in the light of the National Transportation Policy has been the serious decline of coastwise shipping since the outset of World War II. It pointed out that:

> "... where there were 19 companies with 139 vessels operating in the Atlantic-Gulf coastwise trade prior to World War II, today only two deep-water common carriers are operating in that trade with seven vessels, three by Pan-Atlantic and four by Seatrain. And where approximately 8.5 million tons annually were transported in the Atlantic-Gulf coastwise trade prior to the war, the present capacity of the remaining vessels in that trade is only 1.8 million tons. In 1959, Pan-Atlantic's total tonnage, coastwise and Puerto Rican trades, approximated 600,000 tons, as compared with over 1,000,000 tons coastwise alone in 1941. At the outset of World War II, all of the vessels employed in the deep-water coastwise trade were taken over by the Federal government for national defense." (R. 38).

The Commission further found that the "importance of coastwise shipping for national defense purposes has been emphasized repeatedly from various governmental sources." (R. 38-39). The Commission also concluded that "coastwise shipping is important also for general public use as an integral part of the national transportation system," citing the economic dependency of ports and coastal areas upon the availability of water transportation. (R. 39). It further found that "[s]hipper evidence on these records is indicative of a need by the general public for the services of those lines [*i.e.*, water carriers], and that they represent

an important and essential part of a national transportation system adequate to meet the needs of the commerce of the United States and of the national defense." (R. 41).

The Commission adopted the position of the water carriers that the proposed TOFC rates would precipitate a cycle of destructive and vicious rate cutting (R. 39) and found that the "reduced rates of the railroads here under consideration are an initial step in an overall program of rate reductions that can fairly be said to threaten the continued operation, and thus the continued existence of the coastwise water carrier industry generally." (R. 38).

The Commission found that the proposed TOFC rates were limited to those points in competition with water carriers and were not applied to those areas where the primary competition to the railroads was a mode of transportation other than water carriers. (R. 19).

Under these circumstances, the Commission concluded that "we are of the opinion that the objectives of the national transportation policy require the establishment and maintenance of a differential relationship between the rates under investigation on Sea-Land and Seatrain service, on the one hand, and the rates of the rail carriers, on the other, which will allow these water carriers operating in the coastwise trade to maintain rates that will enable them to continue efficient and economical coastwise service." (R. 41).

On February 2, 1961, appellee railroads brought an action in the District Court below to enjoin and set aside that part of the Commission's order which required the cancellation of the TOFC rates. Seatrain and Sea-Land intervened in defense of the order. The District Court set aside the order of the Commission and enjoined it from cancelling TOFC rates which returned at least fully dis-

tributed costs, holding that the Commission had improperly held up the TOFC rate level to protect the traffic of another mode of transportation in violation of Section 15a(3) of the Act. According to the District Court such rate differentials cannot be maintained unless the water carriers will be destroyed as a result of the rail carriers "setting rates so low as to be hurtful to [themselves] as well as [their] competitor or so low as to deprive the competitor of the 'inherent advantage' of being the low cost carrier". (R. 251-252). It is only these cost factors, and no others, the District Court holds, that the Commission may look at under Section 15a(3) in heeding the Congressional mandate to give "due consideration to the objectives of the national transportation policy declared in this Act."

Summary of Argument.

The decision of the District Court nullifies the National Transportation Policy and for all intents and purposes expunges this overriding Congressional declaration of policy from the Interstate Commerce Act. It does so by erroneously concluding that Section 15a(3), as added to the Act in 1958, has effected a major modification of the National Transportation Policy by making the cost of providing the service the controlling determinant as to the reasonableness of competitive rate reductions. Such a conclusion excludes such other important National Transportation Policy factors as the provision for fair and impartial regulation of all modes of transportation subject to the Act, so as to preserve the inherent advantages of each mode, the promotion of safe, adequate, economical and efficient service, the fostering of sound economic conditions in transportation and among the several

carriers, the establishment and maintenance of reasonable rates without unfair or destructive competitive practices—*all to the end of developing, coordinating, and preserving a national system by water, highway and rail,* as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense.

The importance of this case to the coastwise water carriers cannot be stressed too strongly. If the decision of the District Court is permitted to stand, coastwise water service, already the victim of a drastic traffic decline, will be eliminated from the national transportation system.

For over forty years the law has recognized the economic need to control selective rail rate reductions aimed at water carriers. The Transportation Act of 1920 stated the intent of Congress that water transportation be fostered along with rail transportation. (Transportation Act of 1920, §500, 41 Stat. 499 [now Interstate Commerce Act, 49 U. S. C. §142 (1958)]).

The Transportation Act of 1940, 54 Stat. 898, reaffirmed the Congressional condemnation of selective rate reductions aimed at water carriers and expanded the Commission's duty to prevent destructive competition. *Eastern-Central Motor Carriers Association* v. *United States,* 321 U. S. 194, 206 (1944); *Interstate Commerce Commission* v. *A. L. Mechling,* 330 U. S. 567 (1947). It "was recognized in the debates on the bill that became the Transportation Act of 1940 that manipulation of rail rates downward might deprive water carriers of their 'inherent advantages' and therefore violate the Act. It was emphasized that one of the evils to be remedied was cutthroat competition, whereby strong rail carriers would reduce their rates, putting water carriers out of business." *Dixie Carriers, Inc.* v. *United States,* 351 U. S. 56, 59-60 (1956).

The contention that costs are the controlling factor in rate making has been consistently rejected by the Commission and this Court. *Alabama Great Southern R. R.* v. *United States*, 340 U. S. 216, 223 (1951). And the right of the Commission to condemn rates as destructive of a sound national transportation system, even though compensatory, has been upheld by this Court in *New York* v. *United States*, 331 U. S. 284 (1947). It was against this back-drop of long historical precedents and sound economic transportation policy that Section 15a(3) was enacted in 1958.

Section 15a(3) was the culmination of a long controversy which began in 1955. From that time until 1958 the question of whether continued regulation among the different forms of transportation was still required was subjected to intensive study by the Congress. Certain railroads urged that there should be a fundamental reversal of the National Transportation Policy so as to permit each form of transportation to make rates as it pleased, subject only to a requirement that the rates not be below the cost of carrying the traffic. On the other hand, the Interstate Commerce Commission, along with other forms of transportation, urged that long standing experience had established the need for continued regulation and that to permit unrestrained rate cutting would lead to the destruction of the national transportation system and the elimination of carriers whose financial resources would not permit their survival in the face of intensive rate wars.

The issue crystalized around a proposal submitted to the Congress by the Association of American Railroads and which was commonly referred to as the three "shall nots" because it would have prohibited the Commission, in determining the lawfulness of proposed rates, from considering (1) the effect of such rates on the traffic of any other mode of transportation; (2) the relation of such rates to the rates

of any other mode of transportation; and (3) whether such rates are lower than necessary to meet the competition of any other mode of transportation. H. R. 6141, 84th Cong., 1st Sess. §8 (1955).

This revolutionary change in rate regulation did not pass. Nothing like it passed. Not only did Section 15a(3) not change the National Transportation Policy, but it wrote that policy right into the rate making sections of the Act by charging the Commission to give "due consideration to the objectives of the national transportation policy declared in this Act." And the statute does not limit such "due consideration" to a single factor such as costs, as the District Court holds, but encompasses all the objectives of the National Transportation Policy.

Moreover, Section 15a(3), did not, as the District Court seems to suggest by its repeated use of the term "differential prohibition", contemplate a prohibition against rate differentials between rail and water service. Clearly, Section 307(d) of the Act gives the Commission the authority to prescribe such differentials in establishing through routes and joint rates for water and rail carriers. Section 305(c) also manifests a Congressional purpose to give water carriers the protection of rate differentials. Nothing in Section 15a(3) detracts from that Congressional purpose.

The only reason any legislation was enacted in 1958 was to silence the contention that, in exercising its powers, the Commission had gone beyond the public interest considerations and rate making standards contained in the Act and was arbitrarily holding up rate levels of established low-cost carriers solely to protect the traffic and rate structure of the higher cost mode of transportation, without regard to service disabilities, the competitive positions of the carriers or the impact of such rates upon the national transpor-

tation system. While the Commission denied that it had engaged in such umbrella rate making practices, neither it nor any one else had any fundamental objection to a statute restating and reaffirming the Commission's existing authority. This is all that Section 15a(3) was intended to do, and this is all it does.

The effect of the District Court's decision is to read into Section 15a(3) the railroad's three "shall nots" proposal which was completely rejected by the Congress.

The alleged arbitrary rate practices which Section 15a(3) was designed to preclude are not involved in this case. On the contrary, the Commission found that sea-land costs were generally lower than the railroad TOFC costs, that the service of the water carriers was inferior to TOFC service and required a rate differential to attract the traffic, that the proposed TOFC rates would cause a cyclical rate war, resulting in the elimination of the coastwise water service—all to the detriment of the national defense and the shipping public.

I.

Section 15a(3) did not alter the National Transportation Policy and make costs of providing the service the exclusive test for determining the lawfulness of competitive rates.

A. The Law Has Long Recognized the Need to Protect Water Carriers from Destructive Rail Competition and Selective Rail Rate Cutting.

The economic need for protecting water carriers has long been recognized by the law and forms a cornerstone of the National Transportation Policy. It is a need born of experience and the facts of transportation life. Ocean trans-

portation of goods from place to place has no service characteristics which are superior, or even equal, to those of either rail or motor carrier services. The latter services are quicker, more convenient, more flexible, better fitted to production and distribution schedules of manufacturers, involve fewer difficulties and hazards, and have greater availability in point of time and place, than ocean carrier services. Consequently, the ocean carrier industry has but one economic justification for existence, namely, the fact that it provides shippers in the general proximity of coastal areas with a lower cost form of transportation.

The device employed by the railroads to neutralize that advantage is the publication of selective rate reductions —selective in that the railroads maintain much higher rates to and from interior points where they do not face water competition. Such selective rail rate reductions will lead, as the Commission found here, to a cycle of competitive rate reductions resulting in the unnecessary dissipation of the revenues of all the carriers involved, and ultimately to the destruction of the water carriers' services.

It should be observed that upon the elimination of water competition, the excuse for reduced rail rates is gone, and all shippers will then be required to pay the higher normal rail rates. This is one of the principal reasons why port cities have so vigorously championed the cause of the water carrier services. See *War Shipping Administration T. A. Application*, 260 I. C. C. 589, 592-593 (1945); *Hearings on Decline of Coastwise and Intercoastal Shipping Industry Before the Senate Interstate & Foreign Commerce Committee*, 86th Cong., 2d Sess., 83-86 (1960).

Since at least 1910, Congress has legislated to protect the water carrier against destructive rail competition and selective railroad rate cutting. In that year, Section 4(1)

of the Interstate Commerce Act was amended so as to require prior Commission approval before the railroads could charge lower rates for longer hauls. Section 4(2) was added to provide that whenever a railroad reduced its rates at competitive points to meet water competition, it could not again increase them until the Commission found "that such proposed increase rests upon changed conditions other than the elimination of water competition." That paragraph was "designed to prevent the railroads from killing water competition by making excessively low rates;" its "specific purpose . . . is to ensure and preserve water competition; to prevent competition that kills." *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 567-568 (1919).

The Transportation Act of 1920 stated the intent of Congress that water transportation be fostered along with rail transportation as follows:

> "• • • It is declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation • • •." Transportation Act of 1920, §500, 41 Stat. 499 (now Interstate Commerce Act, 49 U. S. C. §142 (1958)).

Under the 1920 Act, the Commission was empowered to fix minimum rates so as to keep in competitive balance the various types of carriers and to prevent rail carriers from destroying their water competition. Thus, H. R. 456, 66th Cong., 1st Sess. (1919), accompanying the Transportation Act of 1920, stated the purpose of giving the Commission this power to be as follows:

> "• • • With this power the Commission could prevent a rail carrier from reducing a rate out of

> proportion to the cost of service, by establishing a minimum, below which such carrier could not fix its rate. *It would also prevent a rail carrier from destroying water competition between competitive points by prohibiting such carrier from so reducing its rates as to destroy its water competitor.* Circumstances have been cited where the rail carrier destroyed its water competitor by such a reduction of rates as to make it impossible for the water carrier to survive. When once competition was thus driven off the rail rates would be restored or would rise to even higher levels. * * *" (at p. 19) [Emphasis supplied].

These objectives of the 1920 Act have been recognized by this Court on numerous occasions. Thus, in *New York v. United States*, p. 13 *supra*, this Court, after discussing several cases in which the Commission had been upheld in taking action "to prevent destructive competition between rail, water and motor carriers," stated its approval of such action as follows:

> "These cases, to be sure, recognize the power of the Commission so to fix minimum rates as to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them. That plainly is one of the objectives of the Act, and one of the reasons why the Commission was granted the power to fix minimum rates by the Transportation Act of 1920." (at 346).

The Transportation Act of 1920 also amended Section 4 of the Act to require that the Commission grant Fourth Section relief only if the reduced rates were "reasonably compensatory". (41 Stat. 456). In the *Transcontinental Cases of 1922*, 74 I. C. C. 48, 71 (1922), the Commission pointed out that these provisions of the 1920 Act were

intended to require, among other things, that rates requiring Fourth Section relief "be no lower than necessary to meet existing competition" and "not be so low as to threaten the extinction of legitimate competition by water carriers." The Commission further stated that "it clearly would defeat the intent of Congress to foster transportation by rail and water in full vigor if the rail carriers were permitted, at practically little or no profit to themselves, to operate so as to deprive water carriers of traffic which the water carriers would naturally handle."

The Transportation Act of 1940, 54 Stat. 898 (1940), reaffirmed the Congressional condemnation of selective rate reductions by rail carriers aimed at water carriers and expanded the Commission's duty to prevent destructive competition. This Court described the function of the Commission, in one of its first major discussions of the 1940 Act, as follows:

> "But with the evolution of other forms of carriage, particularly motor carriage, and the Commission's acquisition of control over their rates and operations, a new situation arose. The Commission's task no longer was merely the regulation of a single form of transport, to secure reasonable and nondiscriminatory rates and service. It became, not merely the regulator, but to some extent the coordinator of different modes of transportation. With the addition of motor and water carriage to its previous jurisdiction over rails, it was charged not only with seeing that the rates and services of each are reasonable and not unduly discriminatory, but that they are coordinated in accordance with the national transportation policy, as declared by the later legislation. This, while intended to secure the lowest rates consistent with adequate and efficient service and to preserve within the limits of the policy the

> inherent advantages of each mode of transportation, at the same time was designed to eliminate destructive competition not only within each form but also between or among the different forms of carriage." [Footnote omitted]. *Eastern-Central Motor Carriers Ass'n.* v. *United States,* 321 U. S. 194, 205-206 (1944).

The Transportation Act of 1940 also recognized the need of water carriers for differentially lower rates as a protective device against the destructive rate practices of the railroads. As this Court said in the *Mechling* case:

> ". . . But the congressional debates and committee reports on the 1940 Act and the statutory provisions which emerged from this legislative background show that Congress enunciated positive policies and specific limiting standards which it expected the Commission to follow in fixing rates, including 'differentials' between all-rail and water-rail rates. The provisions of the Transportation Act of 1940 which brought water carriers under Interstate Commerce Commission jurisdiction were vigorously opposed in Congress by those who feared that the Commission might raise barge rates in order to enable railroads better to compete with inherently cheaper water transportation. These opponents were repeatedly assured by sponsors of the 1940 Act who advocated Commission regulation of water transportation that the questioned legislation unequivocally required the Commission to fix rates which would preserve for shippers the inherent advantages of barge transportation: lower cost of equipment, operation, and therefore service . . ." 330 U. S. at 574.

The Act of 1940 also contains a number of other provisions, *e.g.*, §305(e), 54 Stat. 935 (1940), 49 U. S. C. §905(e)

(1958); §307(f), 54 Stat. 938 (1940), 49 U. S. C. §907(f) (1958); and §3(4), 54 Stat. 903 (1940), 49 U. S. C. §3(4) (1958), the prime purpose of which, as this Court in the *Mechling* case states, "is to protect the water carriers' natural advantages." (330 U. S. at 576).

And that Act expressly provided in the case of a through route, where one of the carriers is a water carrier, for the prescription by the Commission of "such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water." Transportation Act of 1940, §307(d), 54 Stat. 937; 49 U. S. C. §907(d) (1958).

Again, this Court has emphasized in *Dixie Carriers, Inc.* v. *United States*, p. 12 *supra*, that "one of the evils to be remedied [by the Transportation Act of 1940] was cut-throat competition, whereby strong rail carriers would reduce their rates, putting water carriers out of business." (351 U. S. at 59).

Thus, for a period of well over forty years Congress has legislated, the Commission has executed and this Court has recognized a national transportation policy that has fostered a water carrier system with its inherent advantages and other public interest attributes, including that of its importance to the national defense, and has protected that system against selective rate cutting and destructive competition by the rail carriers. This fundamental and long standing policy was abolished, according to the decision of the District Court, in 1958 by the enactment of Section 15a(3). As we shall show in the subsequent portions of this brief, not only was this policy not abolished, but it was reaffirmed by the Congress in its enactment of the Transportation Act of 1958.

B. The Legislative History of Section 15a(3) Manifests a Clear Congressional Intent Not to Weaken the National Transportation Policy Nor Impair the Commission's Implementation of That Policy.

Section 15a(3) did not change the National Transportation Policy nor did it affect the Commission's power to consider the effect of rate reductions upon competitors. The legislative history of this section makes that point abundantly clear.

The legislative history of Section 15a(3) begins in 1955 with S. 1920 and H. R. 6141, 84th Cong., 1st Sess. The proposed legislation provided a new National Transportation Policy which eliminated any reference to "unfair or destructive competitive practices" and contained a completely new rate making rule to take the place of the existing Section 15a. The new Section 15a contained what is commonly referred to as the three "shall nots" because it forbade the Commission, in determining the validity of rates, to consider three important factors which the Commission had traditionally considered: "the effect of such charge on the traffic of any other mode of transportation; or the relation of such charge to the charge of any other mode of transportation; or whether such charge is lower than necessary to meet the competition of any other mode of transportation". H. R. 6141, 84th Cong., 1st Sess. §8 (1955). A storm of opposition arose against H. R. 6141, centering around the three "shall nots," and Congress eventually rejected completely that proposed rule.

Following the introduction of H. R. 6141, the Subcommittee on Transportation and Communication of the House Committee on Interstate and Foreign Commerce (hereinafter referred to as the "House Subcommittee") held extensive hearings in 1956. (*Hearings Before the Subcommittee on Transportation Policy of the House Commit-*

tee on Interstate and Foreign Commerce, 84th Cong. 2d Sess.) [hereinafter cited as *1956 Hearings*.] At the outset of the hearings, the Interstate Commerce Commission recommended against the adoption of the three "shall nots". (*1956 Hearings* 270). Water carrier witnesses also opposed the three "shall nots" rule.

The railroads vigorously endorsed the new legislation. Their chief spokesman, Jervis Langdon, Jr., testified that the railroads regarded the three "shall nots" rule as the basic recommendation of the new legislation and that enactment of that rule would eliminate the need for amending the National Transportation Policy so as to delete the reference to destructive competition. (*Id.* at 537-548). Mr. Langdon concluded that the revised rule of ratemaking contained in H. R. 6141 could be boiled down to simply the three "shall nots". Accordingly, he proposed that there be added to the existing Section 15a a new paragraph (3), reading as follows (*Id.* at 548):

> "(3) In the exercise of its power to prescribe just and reasonable rates, the Commission shall not consider the effect of such rates on the traffic of any other mode of transportation; or the relation of such rates to the rates of any other mode of transportation; or whether such rates are lower than necessary to meet the competition of any other mode of transportation".

The Commission in response to the position of the railroads recommended strongly against the adoption of the three "shall nots." In a letter to the Chairman of the House Committee, dated July 20, 1956, the Commission outlined its position as follows:

> "If the three 'shall nots' were inserted in the rule of ratemaking of Section 15a, the Commission would

> be limited to one test in determining the reasonableness of a rate—whether the rate is compensatory. We are convinced that this would be highly impracticable and inimical to the maintenance of a sound transportation system." (*Id.* at 1767-1771).

The Commission made quite clear what the consequences of the railroad proposal would be—"To put it bluntly, the proposed amendment to Section 15a would, in many instances, enable railroads to drive other forms of transportation out of business. In transportation, as in any other business, with the disappearance of competitors the rates of the victors in such a struggle would not long remain on the depressed competitive levels."

The Commission concluded:

> "We therefore respectfully submit that neither the Nation's balanced, efficient and progressive transportation system, nor the national economy, should be subjected to the disturbances and ultimate damage which would result from enactment of certain provisions of H. R. 6141 or the substitute proposal in the form of the three 'shall nots' as suggested by the Association of American Railroads." (*Id.* at 1771).

This strong attack on the railroads' proposal must be compared with the Commission's acquiescence in the proposal which was finally enacted as 15a(3).

H. R. 6141 died in Committee. In the 85th Congress, 1st Sess., the railroad "short form" version of the three "shall nots" was introduced as H. R. 5523 and 5524. Hearings were held by the House Subcommittee in April 1957. At the hearings the Commission reaffirmed its strong opposition to the three "shall nots." (*Hearings Before the House Subcommittee on Transportation Policy of the House*

Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., 46, 53-59 (1957)).

The scene shifted to the Senate in 1958. From January through April 1958, the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce (hereinafter called the Senate Subcommittee), under the Chairmanship of Senator Smathers, took 2,355 pages of testimony on the "Problems of the Railroads." These covered not only the bitterly contested three "shall nots," but constructive proposals for legislation to ease the railroads' tax burden, provide for equipment loan guarantees, and other problems which the railroads were then encountering. As far as the rate making rule went, the testimony was largely a repetition of what had gone before.

Nevertheless, on April 30, 1958, the Senate Subcommittee recommended to the full Committee a new Section 15a(3), which contained language in part similar to that of the three "shall nots":

> "In a proceeding involving competition with another mode of transportation, the Commission, in determining whether a rail rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by railroad *and not by such other mode.*" [Emphasis supplied].

However, the Senate Subcommittee intended something less than the three "shall nots", for its Report stated:

> "The subject of competitive ratemaking as between the different forms of transportation was discussed at length during the hearings, the railroads urging enactment of legislation that would restrict substantially the authority of the Interstate Commerce Commission in this field. *The subcommittee*

is not convinced that the record before it justifies approval of the railroads' proposal." [Emphasis supplied].

". . . The subcommittee believes and the national transportation policy is clear, however, that such ratemaking should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers."

"It nevertheless appears that the Interstate Commerce Commission has not been consistent in the past in allowing one or another of the several modes of transportation to assert their inherent advantages in the making of rates. The subcommittee recommends, therefore, that the Commission consistently follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of service or of cost. In 1945 in *New Automobiles in Interstate Commerce* (259 ICC 475), the subcommittee believes that the Commission properly construed the intent of Congress in this respect when it said:

> As Congress enacted separately stated ratemaking rules for each transport agency, it obviously intended that the rates of each such agency should be determined by us in each case according to the facts and circumstances attending the movement of the traffic by that agency. In other words, there appears no warrant for believing that rail rates, for example, should be held up to a particular level to preserve a motor-rate structure, or vice versa (259 ICC at p. 538).

"The subcommittee wishes to affirm the interpretation of the Commission given in the *Automobile* case epitomized in the words quoted above. The subcommittee therefore believes it necessary to amend the act only so as, in effect, to admonish the Commission to be consistent in following the policy enunciated in

the *Automobile* case thus assuring reasonable freedom in the making of competitive rates * * *." Report of the Subcommittee on Surface Transportation, Annexed to S. Rep. No. 1647, 85th Cong., 2d Sess. at 18 (1958).

On May 8, 1958, Senator Smathers introduced S. 3778 which embodied in Section 5 the Subcommittee proposal, as well as other amendments to the Act unrelated to competitive ratemaking. The entire Bill was called the "Transportation Act of 1958." (See *Hearings on S. 3778 Before the Senate Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. 1 (1958)) [hereinafter cited as *1958 Senate Hearings*].

Additional hearings were held by the full Committee on this proposal on May 20 and 21, 1958 because, as Senator Smathers said, "in the light of the language, there have been some who have felt that it would work an injustice to them or injury to them" (*1958 Senate Hearings* 6).

In its statement to the full Committee, the Commission pointed out that the proposed language that the Commission shall not "consider the facts and circumstances attending the movement of the traffic . . . by such other mode", was in conflict with the statement in the Subcommittee Report that the Subcommittee desired "the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers". (*Id.* at 167).* The Commission added that the proposal "would be inconsistent with the controlling objectives of the national transportation policy, quoted above, which would remain unchanged" and "would enable the railroads to contend that it is

* In reply to similar contentions made on behalf of Seatrain and Sea-Land, that the language of the Subcommittee's proposal was inconsistent with its report, Senator Smathers stated that the Subcommittee's intent was only to reaffirm the national transportation policy—"we feel it necessary to reemphasize the importance of the national transportation policy . . . That is all we are seeking to do." (*1958 Senate Hearings* 18, 21, 23-24, 29, 32, 70, 85).

intended to give to them complete freedom, in the presence of competition from another mode of transportation, to establish rates which merely cover out-of-pocket costs."

The Commission further noted that all were in accord "with the proposition that rates of a low-cost carrier should not be held up to a particular level to protect the traffic of other carriers;" that the Commission believed it had so applied the law, and if all that was in dispute was whether it had done so, the Commission suggested "that the fears of the railroads might be allayed and the expressed views of the Subcommittee incorporated in the statute by substituting for the proposed paragraph (3) of Section 5 of S.3778 language substantially as follows:

> "(3) In a proceeding involving competition between carriers, the Commission, in determining whether a proposed rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic. Rates of a carrier shall not be held up to a particular level to protect the traffic of a less economic carrier, giving due consideration to the inherent cost and service advantages of the respective carriers." *Id.* at 162.

This new approach was seized upon by the Committee, and the re-drafting of the Subcommittee's proposed new Section 15a(3) (§ 25 *supra*) began at once, along the lines suggested by the Commission (1958 *Senate Hearings* 177-178):

> "Senator Potter. Why don't we put in the amendment to conform with the national transportation policy, strike out the part 'by any other mode'.
>
> "Senator Smathers. The way I look at it if you strike that out, it is just like performing an operation——

"Senator Potter. Actually what we want the Commission to do is to conform to the transportation policy.

"Senator Smathers. That is right.

"Commissioner Freas. We will buy Senator Potter's suggestion.

"Senator Smathers. What I am saying is this: If we don't say 'and not by such other mode,' then you eliminate the inherent advantage, I think. I am afraid that is what has happened. If you strike out 'and not by such other mode,' then the Commission is less and less considering—the cases show less and less consideration here of the advantages of one mode as distinguished from another. They are becoming a giant handicapper more and more, in their desire to do a good job, I mean.

"Senator Potter. I agree that they shouldn't do that, but actually what we want the Commission to do is to carry out the transportation policy. That is what we are trying to say here. Isn't that right?

"Commissioner Freas. That is right.

"Senator Potter. We have a vote."

It was at this point, too, that Commissioner Freas pointed out that in the *New Automobiles* case, the Commission "did consider the facts and circumstances surrounding the movement by all the modes that were involved there." *Id.* at 177).

The final legislation is obviously based on the Commission's proposal and the suggestion of Senator Potter: "Why don't we put in the amendment to conform with the national transportation policy, strike out the part, 'by any other mode'." *Ibid.* Indeed, Senator Potter's second suggestion went even further than the Commission's proposal and both of his suggestions were included verba-

tim in the bill. They were plainly the direct opposites of the three "shall nots."*

The railroads took violent exception, even to the Commission's proposal without the reference to the National Transportation Policy. They wrote the Committee on May 23, 1958, that "the proposal is altogether unacceptable to the railroads." (*Id.* at 186). On June 3, the Senate Committee reported the "Transportation Act of 1958," which included in Section 5 the amendment to Section 15a(3) of the Act as finally adopted (S. Rep. No. 1647, 85th Cong., 2d Sess. (1958)). Section 15a(3), as finally adopted provides as follows:

> "In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, *giving due consideration to the objectives of the national transportation policy declared in this Act.*" (Emphasis supplied)

The Committee pointed out that it had changed the proposal submitted by its Subcommittee but agreed with the Subcommittee's comments with respect to the *New Automobiles* case, and said:

> "The committee wishes further to emphasize that the amendment in regard to section 5 amending

* In the later debate on the bill, Senator Potter pointed out the significance of the inclusion of his second suggestion: "Representatives of each mode of transportation testified before the committee that they would be perfectly happy to have their rate sections considered according to the national transportation policy. So in determining a rate, whether it be the rate for trucks, barge lines, or railroads, we stated that it had to be consistent with the national transportation policy." 104 Cong. Rec. 10860 (1958).

> section 15a of the act as framed by the committee is designed to encourage competition in transportation by allowing each form of transportation subject to the Interstate Commerce Act full opportunity to make rates reflecting the inherent advantages each has to offer, with such ratemaking being regulated by the Interstate Commerce Commission, however, to prevent 'unfair or destructive competitive practices' *as contemplated by the declaration of national transportation policy*. Under the committee amendment the principal emphasis, *but not the exclusive emphasis*, in a competitive ratemaking proceeding involving different modes of transportation will be on the conditions surrounding the movement of the traffic by the mode to which the rate applies." [Emphasis supplied]. S. Rep. No. 1647 at 3.

Meanwhile, on May 19, 1958, the House Subcommittee had resumed hearings on the "Railroad Problems", and in particular with respect to H. R. 12488, which was identical to the proposal of the Senate Subcommittee as originally embodied in S. 3778. At the conclusion of these House hearings, the revisions made by the full Senate Committee in S. 3778 became known. The House Subcommittee then asked the carriers for comment on the revised bill.

On May 27, 1958, the railroads, in reply, gave up their fight for the three "shall nots" and grudgingly stated: "In general, it may be said that this proposal [S. 3778 as revised] does not give us the full measure of relief we sought in the making of competitive rates but clearly it does permit the forces of competition to play a stronger part in ratemaking than heretofore." *Hearings Before the Subcommittee on Transportation Policy of the House Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. at 480 (1958) [hereinafter cited as *1958 House Hearings*].

The motor carriers advised the House Subcommittee that they had no objections to the bill because: "To the

extent that the writing into statutory form of the present policy of the I.C.C. may once and for all put an end to the continuous complaint of the railroads, that a so-called umbrella is being held over the rates of rail competitors, the trucking industry does not oppose this specific proposal." (*1958 House Hearings* 480-481).

The Chairman of the House Committee on Interstate and Foreign Commerce, Congressman Harris, then included the revised Senate Committee version of Section 15a(3) as part of H. R. 12832 (introduced June 5, 1958—104 Cong. Rec. 10345). The bill was reported to the House on June 18, 1958 (H. R. Rep. No. 1922, 85th Cong., 2d Sess.). The Report pointed out (at 13-15):

> "The committee believes that each mode of transportation should have opportunity to make rates reflecting the different inherent advantages each has to offer so that the public may exercise its choice among them, cost and service both considered, in the light of the kind of transportation desired. The committee believes, however, and the national transportation policy is clear, that such ratemaking should be regulated by the Commission to prevent unfair destructive practices on the part of any carrier or group of carriers."
>
> • • • • • •
>
> "The committee believes that the Commission consistently should follow the principle of allowing each mode of transportation to assert its inherent advantages, whether they be of cost or service, *giving due consideration to the objectives of the national transportation policy declared in the Interstate Commerce Act.*" [The Report then quotes the statement of National Transportation Policy in the Act]. (Emphasis supplied)
>
> • • • • • •
>
> "The committee feels, accordingly, that an amendment to the rule of ratemaking is desirable to

serve as a guide to the Commission in achieving consistency in its treatment of competitive rate cases."

* * * * * *

"The committee is of the opinion that the effect of this amendment will be to encourage competition between the different modes of transportation for the benefit of the shipping public. It understands that the amendment, while not having the full endorsement of all of the modes of transportation, at least is not unacceptable to any of them."

S. 3778 was finally enacted into law on August 12, 1958. In the light of this legislation's evolution from a railroad sponsored bill designed to eliminate the Commission's control over rates to a Congressional admonition to the Commission to be consistent in its ratemaking decisions in following the *New Automobiles* case, it can scarcely be contended that Section 15a(3) made any significant change in the National Transportation Policy.

Surely the foregoing legislative history denotes no intention to abandon an overriding National Transportation Policy, which this Court has held "is to govern the Commission in the administration and enforcement of all provisions of the Act" and "is the yardstick by which the correctness of the Commission's actions will be measured". *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, 88 (1957). In fact Congress took the unusual but significant step of writing the National Transportation Policy into Section 15a(3) by a direct command to the Commission to give due consideration to that policy in its determinations under that section.

C. The District Court Erred in Making Costs the Controlling Determinant as to The Lawfulness of Competitive Rates, to the Exclusion of Other National Transportation Policy Considerations.

The decision of the District Court exalts the cost of furnishing the service to a position of such preeminence that

it becomes the controlling, and well-nigh exclusive, factor to be considered in determining the lawfulness of competitive rates. For the District Court holds that rate differentials between rail and water services can only be maintained when rates are set "so low as to be hurtful to the proponent as well as his competitor or so low as to deprive the competitor of the 'inherent advantage' of being the low-cost carriers." (R. 251-252). Both the Commission and this Court have consistently rejected the proposition that costs are the controlling factor in rate making. *New York* v. *United States*, 331 U. S. 284, 331 (1947); *Alabama Great Southern R. R.* v. *United States*, 340 U. S. 216, 223 (1951).* In the latter case the Commission had *prescribed* reasonable differentials between all-rail rates and rail-water rates without proof of lower costs of the rail-water service, and the railroads contended that, without such proof, the inferiority of service alone did not authorize the Commission to prescribe lower rail-water rates. (*Id.* at 221). The Supreme Court found this argument "not persuasive" because:

> "Admittedly, barge service is worth less than rail service. It is slower, requires more handling and entails more risk. A shipper will pay only what the service is worth to him. The shippers' evidence, the Commission found, indicated a fairly unanimous view that the principal worth to them of shipping by barge was the saving in transportation expense which it offered. The Commission is not bound to require a rate as high for the inferior as for the superior service. To do so would certainly destroy the principal worth of the inferior service and send all freight to the railroads; practically, there would be no competition between the different modes of transportation.

* In the *Alabama* case at 223 fn. 4, this Court lists the cases which reject the "exclusive cost theory."

> "Neither the Commission nor this Court has held that lesser cost of service is a finding without which the Commission may not fix a charge, division of rate, or differential." (Footnote omitted.) (*Id.* at 223.)

The right of the Commission to condemn rates as destructive of a sound national transportation system, even though compensatory, has been upheld by this Court in *New York* v. *United States*, p. 34 *supra*. In the *New York* case, 331 U. S. at 345, the Court cites with approval *Scandrett* v. *United States*, 32 F. Supp. 995, 996 (1940), *aff'd* 312 U. S. 661 (1941), wherein the "Commission had found that proposed reduced rates were 'compensatory considering all costs' but that they were below a minimum reasonable level and therefore unlawful. It took that action to prevent destructive competition between rail, water, and motor carriers. The court sustained the order."

Nowhere does Section 15a(3) state that costs are to be the controlling factor in judging the reasonableness of rates. Costs are not even expressly mentioned. The section does, however, expressly require the Commission to give "due consideration to the objectives of the national transportation policy declared in this Act." Nor is such consideration to be confined to a single objective, such as the cost factor; the Congressional mandate is directed to all the objectives of the National Transportation Policy.

Discounted by the District Court decision were such important National Transportation Policy factors as the competitive impact of the TOFC rates upon the water carriers, the fostering of sound economic conditions in transportation and among the several carriers, the development, co-ordination and preservation of a national transportation system by *water*, highway and rail and the commercial and national defense needs for water service.

Despite the holdings of this Court in such cases as *Interstate Commerce Commission* v. *A. L. Mechling*, p. 12 *supra*, *New York* v. *United States*, p. 34 *supra* and *Alabama Great Southern R. R.* v. *United States*, p. 13 *supra*, on the need for evaluating the impact of rate reductions on competitive modes and the clear rejection by Congress of the railroad espoused proposals to disregard the effect of such rate reductions upon other modes, as demonstrated by the legislative history of Section 15a(3), the District Court considers the adverse effect of rate competition on other modes as unimportant and irrelevant, even if that effect is to destroy the other mode. (R. 251).

Whereas, the Commission in the exercise of its duties to "foster sound economic conditions in transportation and among the carriers" found that the proposed TOFC rates would precipitate a cyclical rate war (R. 39), the District Court rejects this finding as a basis for acting under Section 15a(3) with a suggestion that the Commission can disapprove non-compensatory rates under Section 15(1). (R. 257). But the National Transportation Policy clearly prohibits ruinous rate wars. The *New York* decision and Section 15a(3) just as clearly require the Commission to heed that policy in passing upon the lawfulness of rates. Thus, the Commission was entirely correct in taking this issue into consideration in its rejection of the proposed TOFC rates.

While the Commission, in the exercise of its duty to preserve water service under the National Transportation Policy, found that the proposed TOFC rates were an initial step in an overall program of rate reductions that would threaten the existence of the coastwise water carrier industry, the District Court erroneously views such findings as unimportant in the light of its belief that the adverse effect

of rates on competitors is not a factor to be considered under Section 15a(3).

The Commission, in passing upon the proposed TOFC rates and their destructive effect upon the water carriers, properly considered the national defense importance of water service. This, the District Court states, was erroneous since "national defense is not stated as an operative policy or means: it is mentioned only as the hoped-for 'end' of the National Transportation Policy." (R. 256).

The District Court's relegation of national defense to a "hoped-for end" rather than an operative policy factor to be considered by the Commission runs counter to the National Transportation Policy. As another district court stated in *Cantlay & Tanzola v. United States*, 115 F. Supp. 72, 80 (S. D. Cal. C. D. 1953), in holding that the Commission was required to consider the national defense factor, all "relevant factors of the National Transportation Policy must be at least considered by the Commission in every proceeding." The downgrading of the national defense factor by the District Court is also inconsistent with the national defense requirements of other transportation statutes.

In the Merchant Marine Act of 1920 the Congress stated:

> "That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine . . ." 41 Stat. 988, 46 U. S. C. 861 (1958).

Section 101 of the Merchant Marine Act of 1936 reads as follows:

> "It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry *its domestic water-borne commerce* and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such *domestic* and foreign water-borne commerce at all times; (b) capable of serving as a naval and military auxiliary in time of war or national emergency; (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable; and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine." [Emphasis supplied.] (49 Stat. 1985, 46 U. S. C. §1101 (1958)).

Section 102 of the Federal Aviation Act of 1958 provides as follows:

> "In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> "(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense." (72 Stat. 740, 49 U. S. C. §1302 (1958)).

Thus it is clear that national defense is an important factor to be considered by all of the transportation regulatory agencies in administering their respective statutes. The Interstate Commerce Commission is no exception.

In conclusion, it should be pointed out that the *New Automobiles* case, to which Section 15a(3) gives Congressional expression and approval, never made the cost of providing the service the exclusive determinant as to the lawfulness of a rate. There is no suggestion in that case that the Commission must close its eyes to the impact of a rate reduction on other carriers or the national transportation system. The Commission, in fact, said quite the opposite:

> "What constitutes a minimum reasonable rate is a matter to be determined in the light of the facts of record in each individual case, avoiding arbitrary action and keeping within statutory and constitutional limitations, just as in the case of maximum reasonable rates. Whether a rate is below a reasonable minimum depends on whether it yields a proper return; whether the carrier would be better off from a net-revenue standpoint with it than without it; *whether it represents competition that is unduly destructive to a reasonable rate structure and the carriers; and whether it otherwise conforms to the national transportation policy* and the rules of the ratemaking declared in the act of 1940." [Emphasis supplied.] (259 I. C. C. at 534).

What the Commission did in the *New Automobiles* case was to reject the "umbrella" rate concept, *i.e.*, the arbitrary holding up of rate levels of proven low-cost carriers just to protect the higher cost mode's share of the business, without regard to the competitive positions of the carriers or the impact of the rates upon the national transportation system. No such arbitrary Commission rate practices are involved

in this case. Here, unlike *New Automobiles*, the proponent of the rate was not the proven low-cost carrier, but the high-cost carrier, insofar as TOFC service was concerned. Whereas, here, the Commission found that the proposed TOFC rates would cause a cyclical rate war, resulting in the elimination of coastwise service to the detriment of shippers and the national defense, no such findings were made in *New Automobiles*. On the contrary, the Commission there expressly stated as follows:

> "There is no showing that the rate structures under consideration threaten the financial stability of the carriers . . ." (259 I. C. C. at 539).

The District Court's preoccupation with costs to the exclusion of the other objectives of the National Transportation Policy is clearly erroneous and contrary to over forty years of Congressional mandates, administrative interpretations and judicial precedents, including those of this Court.

D. Section 15a(3) Does Not Prohibit the Prescription of Rate Differentials Between Rail and Water Carriers.

On several occasions in its decision the District Court refers to Section 15a(3) as a "differential prohibition". That Section 15a(3) cannot be construed in this manner is clear. Such a construction runs counter to the National Transportation Policy, vitiates other sections of the Act and does not comport with the legislative history of Section 15a(3) itself.

The Transportation Act of 1940, 54 Stat. 898, contains many provisions recognizing the need of water carriers for differentially lower rates, in order to preserve their natural advantage of lower costs of service. *Interstate Commerce Commission* v. *A. L. Mechling*, p. 12 *supra* at 576.

This need was recognized, even in the absence of proof of lower costs of rail-water service *vis-a-vis* all-rail service, in *Alabama Great Southern Railroad Co.* v. *United States*, p. 13 *supra*.

Section 305(c) of the Act in providing that "Differences in . . . rates . . . and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination . . . or an unfair or destructive competitive practice . . ." clearly manifests Congressional approval of lower differentials in favor of water carriers. And Section 307(d) of the Act makes express provision for rate differentials as follows:

> "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."*

Differentials reflecting the lower cost of water service are to be observed in the establishment of joint rates in order to preserve the inherent advantages of the water carriers. *Dixie Carriers* v. *United States*, p. 12 *supra*.

Clearly Section 15a(3) with its direction to give due consideration to the National Transportation Policy cannot be deemed to have repealed Sections 305(c) and 307(d) of the Act. When Congress passed Section 15a(3) it was very much aware of the foregoing sections of the Act. During the hearings before the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2nd Sess. on S. 3778, at a time when that bill proposed a new Section 15a(3) that

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*Seatrain participates in through routes and joint rates with connecting rail carriers.

would have prevented the Commission from considering facts and circumstances attending the traffic of modes other than rail, the President of Seatrain expressed concern that the proposed amendment might deprive the water carriers of the protection of Section 307(d). Members of the Committee indicated no such intention, were informed by their counsel that Section 305(c) of the Act guarantees the right of water carriers to lower rates and expressed their belief that the National Transportation Policy would be controlling. (Sen. Hearings on S. 3778, 85th Cong., 2d Sess. at 29-31). Surely then, when S. 3778 was enacted in its final form as Section 15a(3) with the prohibition against considering the effect of rate reductions on other modes eliminated and the substitution in its place of a specifically expressed requirement that due consideration be given the National Transportation Policy, there cannot be the slightest doubt that the differentials contemplated by Section 305(c) and 307(d) of the Act were not abrogated by Section 15a(3). Thus the District Court's constant characterization of Section 15a(3) as a differential prohibition is erroneous.

Conclusion.

For all the foregoing reasons the judgment of the District Court should be reversed and the cause remanded to the District Court, with directions to dismiss the complaint.

Respectfully submitted,

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January 9, 1963.

APPENDIX.

Statutes Involved.

Transportation Act of 1940—Declaration of National Transportation Policy.

(54 Stat. 898, 899, 49 U. S. C. preceding § § 1, 301, 901 and 1001)

SECTION 1. The Act entitled "An Act to regulate commerce", approved February 4, 1887, as amended . . . is amended by inserting before Part I the following:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preference or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Sec. 15. Determination of Rates, Routes, Etc.

(7) [24 Stat. 384, 54 Stat. 911, as amended 49 U. S. C. §15(7)] Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons

in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

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Sec. 15a as Amended 49 U. S. C. §15a*

(1) [41 Stat. 488, 48 Stat. 220, 54 Stat. 912] When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) [41 Stat. 488, 48 Stat. 220, 54 Stat. 912] In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

(3) [72 Stat. 572] In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement

* Prior to 1958, section 15a was comprised of sections (1) and (2). The only change made by the 1958 amendment was the addition of section (3) (72 Stat. 572).

of the traffic by the carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act.

Sec. 305. Rates, Fares, Etc.

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(c) [54 Stat. 934, 49 U. S. C. §905] It shall be unlawful for any common carrier by water to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic in any respect whatsoever; or to subject any particular person, port, port district, gateway, transit point, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided*, That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description. Differences in the classifications, rates, fares, charges, rules, regulations, and practices of a water carrier in respect of water transportation from those in effect by a rail carrier with respect to rail transportation shall not be deemed to constitute unjust discrimination, prejudice, or disadvantage, or an unfair or destructive competitive practice, within the meaning of any provision of this Act.

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Sec. 307. Commission's Authority Over Rates, Etc.

(d) [54 Stat. 937, 49 U. S. C. §907] The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint

rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

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